Supreme Court, U.S.
FILED

03 894 DEC 17 2003

No.

In The

Supreme Court of the United States

THOMAS J. KUZMA,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly applied this Court's holding in *Landgraf* regarding the retroactivity of 38 U.S.C. §§ 5103 and 5103A or whether this Court's holdings in *Bradley* and *Thorpe* require both the Veterans' Court and the court of appeal to apply the law in effect at the time it renders its decision.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	14
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

Bernklau v. Principi, 291 F.3d 795 (Fed.Cir. 2002)...6, 8, 11

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988)..... 9

Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974).....*passim*

Dyment v. Principi, 287 F.3d 1377 (Fed.Cir. 2002)..6, 8, 11, 14

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1998)..... 7

Holliday v. Principi, 14 Vet.App. 280 (2001).....5, 6, 7, 8, 12

Karnas v. Derwinski, 1 Vet.App. 308 (1991).....*passim*

Kuzma v. Principi, 341 F.3d 1327 (Fed.Cir. 2003)..... 6

Landgraf v. USI Film Products, 511 U.S. 244 (1994) ..*passim*

Lorillard v. Pons, 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978)..... 7

Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1968).....*passim*

STATUTES

28 U.S.C. § 1254(1) 1

38 U.S.C. § 5103..... 1, 6, 11, 13, 14

38 U.S.C. § 5103A..... 2, 6, 11, 13, 14

TABLE OF AUTHORITIES – Continued

Page

OTHER

Civil Rights Act in 1991 8

Title VII of the Civil Rights Act of 1964 ..... 8, 13

The Veterans Claims Assistance Act of 2000 (VCAA) ..... *passim*

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra 1-5) is reported at 341 F.3d 1327 (Fed.Cir. 2003). The opinion of the United States Court of Appeals for Veterans Claims (App., infra 10-18) is reported at No. 98-295, 2002 WL 1822051 (Vet.App. July 30, 2002).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 25, 2003. A petition for rehearing *en banc* was denied on October 16, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

38 U.S.C. § 5103 states:

> (a) **Required information and evidence.** – Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As a part of that notice, the Secretary shall

indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

(b) **Time limitation.** – (1) In the case of information or evidence that the claimant is notified under subsection (a) is to be provided by the claimant, if such information or evidence is not received by the Secretary within one year from the date of such notification, no benefit may be paid or furnished by reason of the claimant's application.

(2) This subsection shall not apply to any application or claim for Government life insurance benefits.

38 U.S.C. § 5103A states:

(a) **Duty to assist.** – (1) The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary.

(2) The Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim.

(3) The Secretary may defer providing assistance under this section pending the submission by the claimant of essential information missing from the claimant's application.

(b) **Assistance in obtaining records.** – (1) As part of the assistance provided under subsection (a), the Secretary shall make reasonable efforts

to obtain relevant records (including private records) that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain.

(2) Whenever the Secretary, after making such reasonable efforts, is unable to obtain all of the relevant records sought, the Secretary shall notify the claimant that the Secretary is unable to obtain records with respect to the claim. Such a notification shall –

(A) identify the records the Secretary is unable to obtain;

(B) briefly explain the efforts that the Secretary made to obtain those records; and

(C) describe any further action to be taken by the Secretary with respect to the claim.

(3) Whenever the Secretary attempts to obtain records from a Federal department or agency under this subsection or subsection (c), the efforts to obtain those records shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile.

(c) **Obtaining records from compensation claims.** – In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (b) shall include obtaining the following records if relevant to the claim:

(1) The claimant's service medical records and, if the claimant has furnished the Secretary information sufficient to locate such records, other relevant records pertaining to

the claimant's active military, naval, or air service that are held or maintained by the governmental entity.

(2) Records of relevant medical treatment or examination of the claimant at Department health-care facilities or at the expense of the Department, if the claimant furnishes information sufficient to locate those records.

(3) Any other relevant records held by any Federal department or agency that the claimant adequately identifies and authorizes the Secretary to obtain.

(d) **Medical examinations for compensation claims.** – (1) In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.

(2) The Secretary shall treat an examination or opinion as being necessary to make a decision on the claim for purposes of paragraph (1) if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant) –

(A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms or disability; and

(B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service; but

(C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

(e) **Regulations.** – The Secretary shall prescribe regulations to carry out this section.

(f) **Rule with respect to disallowed claims.** – Nothing in this section shall be construed to require the Secretary to reopen a claim that has been disallowed except when new and material evidence is presented or secured, as described in section 5108 of this title.

(g) **Other assistance not precluded.** – Nothing in this section shall be construed as precluding the Secretary from providing such other assistance under subsection (a) to a claimant in substantiating a claim as the Secretary considers appropriate.

STATEMENT OF THE CASE

Mr. Kuzma's appeal of his denial of an increase in his rating for his service-connected condition had been affirmed by the Veterans' Court, but prior to the issuance of the mandate, Congress enacted the Veterans Claims Assistance Act of 2000 (VCAA). Based upon the enactment of the VCAA, the Veterans' Court recalled its judgment affirming the Board's decision on November 7, 2000 and ordered supplemental briefing regarding the impact of the enactment of the VCAA. Mr. Kuzma filed a motion for remand relying upon the Veterans' Court's precedent in *Karnas v. Derwinski*, 1 Vet.App. 308 (1991) and *Holliday v. Principi*, 14 Vet.App. 280 (2001).

The Veterans' Court denied Mr. Kuzma's motion for remand relying upon the decisions of the Federal Circuit in *Dyment v. Principi*, 287 F.3d 1377 (Fed.Cir. 2002) and *Bernklau v. Principi*, 291 F.3d 795 (Fed.Cir. 2002), which held that section 3(a) of the VCAA, now codified at 38 U.S.C. §§ 5103 and 5103A, was not retroactively available to claims pending on date of enactment of the VCAA, November 9, 2000. An appeal of the Veterans' Court's decision was taken by Mr. Kuzma to the Federal Circuit.

The court of appeals held that it was obligated to apply both the Supreme Court precedent and its own precedent to resolve issues before them and overruled decisions of the Veterans' Court in *Karnas* and *Holliday* to the extent that they conflict with the Supreme Court's and their own binding authority. *Kuzma v. Principi*, 341 F.3d 1327, 1329 (Fed.Cir. 2003).

In *Karnas*, the Veterans' Court established a rule of law to be applied by that Court with regard to a change in law during the pendency of an appeal:

> where the law or regulation changes after a claim has been filed or reopened but before the administrative or judicial appeal process has been concluded, the version most favorable to appellant should and we so hold will apply *unless Congress provided otherwise* or permitted the Secretary of Veterans Affairs (Secretary) to do otherwise and the Secretary did so. (emphasis added). *Karnas*, 1 Vet.App. at 313.

The Veterans' Court, in establishing this rule, relied upon this Court's decisions in *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974) and *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268 (1968). *Karnas*, 1 Vet.App. at 312.

The Veterans' Court concluded that for purposes of considering appeals to that Court, this Court's decisions in *Bradley* and *Thorpe* were controlling. The Veterans' Court held that:

> This formulation would never result in "manifest injustice" to the United States Government because Congress controls or may permit the Secretary to control which law is to be applied. The rule which we adopt would also comport with the general thrust of the duty-to-assist and the benefit-of-the-doubt doctrines embedded in title 38 of the United States Code and Code of Federal Regulations which spring from a general desire to protect and do justice to the veteran who has, often at great personal cost, served our country. *Karnas*, 1 Vet.App. at 313.

In *Holliday* the Veterans' Court applied *Karnas*' holding that:

> there can be no question that Congress, which is presumed to be aware of that opinion [referring to *Karnas*] and its progeny at the time of enacting the VCAA, clearly did not provide the specificity required by *Karnas* to disavow retroactivity. *See generally, Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1998) ("[w]e generally presume that Congress is knowledgeable about existing law pertinent to legislation it enacts"); *Lorillard v. Pons*, 434 U.S. 575, 580-81, 98 S.Ct. 866, 55 L.Ed.2d. 40 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where . . . Congress adopts a new law incorporating sections of a prior law Congress can

> normally be presumed to have had knowledge of the interpretation given to the incorporated law. . . ." (citations omitted)). *Holliday*, 14 Vet.App. at 286.

The Veterans' Court's decision in *Karnas* correctly relied upon the rule of law provided for by this Court in *Bradley* and *Thorpe*, that the Veterans' Court would apply the law as it existed at the time of their decision and subsequently held in *Holliday* that all provisions of the VCAA are potentially applicable to claims pending on the date of the VCAA's enactment.

REASONS FOR GRANTING THE WRIT

The court of appeals erroneously relied upon this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), rather than this Court's decision in *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974) and *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268 (1968). Because, the court of appeals' decisions in *Dyment* and *Bernklau* were wrongly decided, the result in this case was to have erroneously overruled the Veterans' Court's decisions in *Karnas* and *Holliday*.

This Court's Holding in *Landgraf*.

Landgraf involved a suit under Title VII of the Civil Rights Act of 1964 . . . she had been sexually harassed by a co-worker at respondent USI Film Products, . . . *Landgraf*, 511 U.S. at 244. During the pendency of the appeal, Congress enacted an amendment to the Civil Rights Act in 1991. This Court expressly held that:

> . . . this Court must focus on the apparent tension between two seemingly contradictory canons for interpreting statutes that do not specify their temporal reach: the rule that a court must apply the law in effect at the time it renders its decision . . . and the axiom that statutory retroactivity is not favored, . . . *Landgraf*, 511 U.S. at 245.

This Court noted that, "It is not uncommon to find 'apparent tension' between different canons of statutory construction." *Landgraf*, 511 U.S. at 263.

Thus, *Landgraf* stands for the following propositions:

> "[a] court is to apply the law in effect at the time it renders its decision," *Landgraf*, 511 U.S. at 264.
>
> "[r]etroactivity is not favored in the law," and its interpretive corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Landgraf*, 511 U.S. at 264.
>
> This Court concluded that there is no tension between the holdings in *Bradley* and *Bowen*[1], both of which were unanimous decisions. *Landgraf*, 511 U.S. at 264.

This Court specifically indicated that the opinion in *Bowen* did not purport to overrule *Bradley* or to limit its reach. *Landgraf*, 511 U.S. at 265.

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[1] *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988).

The opinion in *Landgraf* acknowledges:

> Although we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should "apply the law in effect at the time it renders its decision," *Bradley*, 416 U.S. at 711, 94 S.Ct. at 2016, even though that law was enacted after the events that gave rise to the suit. *Landgraf*, 511 U.S. at 273.

Landgraf held that:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. *Landgraf*, 511 U.S. at 280.

The analysis made by the Supreme Court in *Landgraf* was that:

> In cases like this one, in which prior law afforded no relief, § 102 can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced. Section 102 confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged,

> and the novel prospect of damages liability for their employers. *Landgraf*, 511 U.S. at 283.

This Court expressly distinguished its holding in *Landgraf* from the holding in *Bradley* in the following passage:

> Even under that view, however, the provision would, if applied in cases arising before the Act's effective date, undoubtedly impose on employers found liable a "new disability" in respect to past events. The extent of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored. Neither in *Bradley* itself, nor in any case before or since in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment. *Landgraf*, 511 U.S. at 283-284.

Why the Decisions of this Court in *Thorpe/Bradley* were for Application, in *Dyment* and *Bernklau* and not this Court's Decision in *Landgraf*.

Although this Court in *Landgraf* applied the rule of law that retroactivity is not favored in the law, *Landgraf* also explicitly reaffirmed the continuing viability of the holdings in *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974) and *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1968). *Landgraf*, 511 U.S. 277-280. *Landgraf* applied the rule of retroactivity to certain "recognized situations," while acknowledging that there are other circumstances where courts should apply the law in effect at the time it renders its decision. Section 3(a) of the VCAA, now codified at 38 U.S.C. §§ 5103 and 5103A, should have been considered to have been within the category of the "recognized situations," in which the law in

effect at the time of the Court's decision, was for application.

Section 3(a) of the VCAA, as recognized by the Veterans' Court in *Holliday*, did not burden private rights, did not impose an additional burden on the government, and did not increase a parties liability for past conduct. *Landgraf* clearly articulated that notwithstanding the long embraced presumption against statutory retroactivity, "in many situations a Court should apply the law in effect at the time it renders its decisions." *Landgraf*, 511 U.S. at 273. *Landgraf* clearly states that "even absent specific legislative authorization, application of new statutes past after the events in suit is unquestionably proper in many situations." *Landgraf*, 511 U.S. at 273.

Despite the fact that the rule of retroactivity was applied by this Court in *Landgraf*, this Court took great care to distinguish the parallel line of cases in *Thorpe* and *Bradley* from the cases in which the presumption against statutory retroactivity was to be invoked. *Landgraf*, 511 U.S. at 276-279. "*Bradley* relied on *Thorpe* and on other precedents that are consistent with the presumption against statutory retroactivity, including decisions involving explicitly retroactive statutes." *Id.* at 278. Consistent with this Court's analysis in *Landgraf*, the Veterans' Court in *Karnas* correctly relied upon this Court precedent established in *Bradley* and *Thorpe* to conclude that the rule of law to be applied in that Court's was the "law as it existed at the time," of the appellate decision. *Landgraf* expressly declared that "we now make it clear that *Bradley* did not alter the well-settled presumption against application of the class of new statutes that would have genuinely 'retroactive' effect." *Id.* at 277.

While this Court allowed for the retroactive application of newly created law in both *Thorpe* and *Bradley*, this Court in *Landgraf* emphasized that those holdings were compatible with their line of decisions disfavoring "retroactive" application of statutes. *See Landgraf*, 511 U.S. at 276-277. Simply stated, *Landgraf* held that in both *Thorpe* and *Bradley* there were "recognized situations" where retroactive effect was unquestionably proper and the Court should apply the law in effect at the time it renders its decision.[2] Equally, the retroactive application of 38 U.S.C. §§ 5103 and 5103A would provide comparable assistance benefits to all veterans without a manifest injustice to the government as noted by the Veterans' Court in *Karnas* in applying this Court's decisions in *Thorpe* and *Bradley* to appeals pending before the Veterans' Court.

Mr. Kuzma submits that this Court's decision in *Landgraf* acknowledged that the retroactive application of the statute at issue, in *Landgraf*, was not the type of

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[2] It should be noted that *Thorpe* and *Bradley* as is the circumstances here involved statutory amendments that worked a benefit to a class of private persons. In *Thorpe*, the administrative rule given retroactive effect provided that federal housing authority had to give a tenant notice of reasons and opportunity to respond before being evicted. The *Landgraf* Court stated that the *Thorpe* holding was consistent with the principle that the government should accord race to private parties disadvantaged by an old rule when it adopts a new and more generous one. *Landgraf*, 511 U.S. at 276 n.30. Similarly, in *Bradley*, the Supreme Court gave retroactive effect to an attorney fee provision contained in an amended statute. The Supreme Court noted that an award of attorney fees under the Civil Rights Act of 1964 served to benefit private plaintiffs as it put them in a position to advance to public interest by invoking the injunctive powers of the federal courts. *Bradley*, 416 U.S. at 719.

provision which fell into the *Thorpe/Bradley* line of decisions. Conversely, § 3(a) of the VCAA does fall within the *Thorpe/Bradley* line of decisions from this Court. There was nothing in the holding in *Landgraf* that should have caused the court of appeals in *Dyment* and *Bernklau* to have concluded that § 3(a) of the VCAA should not have been applied by the Veterans' Court or the court of appeals as the law as it existed at the time of their decisions consistent with this Court's decisions in *Thorpe* and *Bradley*.

The holdings in *Thorpe* and *Bradley* were for application in the disposition of *Dyment* and *Bernklau*. The rule of law created in *Thorpe* and *Bradley* requires that the law as it existed at the time of the appellate decision should have been applied, as had been previously recognized by the Veterans' Court in *Karnas*. The application of the *Thorpe/Bradley* line of cases is further buttressed by the uniquely proclaimant nature of the statutory scheme which was being reaffirmed and clarified by Congress in enacting 38 U.S.C. §§ 5103 and 5103A.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
for the Federal Circuit

03-7032

THOMAS J. KUZMA,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee.

Kenneth M. Carpenter, Carpenter, Chartered, of Topeka, Kansas, argued for claimant-appellant.

John S. Groat, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for respondent-appellee. With him on the brief were *David M. Cohen*, Director; and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief were *Richard J. Hipolit*, Deputy Assistant General Counsel; and *Martie S. Adelman*, Attorney, Department of Veterans Affairs, of Washington, DC.

Appealed from: United States Court of Appeals for Veterans Claims

Judge Donald L. Ivers

DECIDED: August 25, 2003

Before MAYER, *Chief Judge*, NEWMAN and LOURIE, *Circuit Judges*.

MAYER, *Chief Judge*.

Thomas J. Kuzma appeals the judgment of the United States Court of Appeals for Veterans Claims denying his motion for remand to the Board of Veterans' Appeals pursuant to the Veterans Claims Assistance Act ("VCAA"). *Kuzma v. Principi,* No. 98-295, 2002 WL 1822051 (Vet. App. July 30, 2002). Because the Court of Appeals for Veterans Claims correctly applied our precedent, we affirm.

Background

Kuzma served on active duty in the Marine Corps from 1969 to 1971, including service in Vietnam. In 1996, he received a fifty percent disability rating from the Department of Veterans Affairs regional office for post-traumatic stress disorder and dysthymic disorder. Kuzma appealed to the board, and it denied his claim for an increased rating in 1997. He then appealed to the Court of Appeals for Veterans Claims, which affirmed the board's decision on November 7, 2000. One week later, the court recalled its judgment in light of the enactment of the VCAA. Kuzma filed a motion to remand, contending that that court's precedent required it to give retroactive effect to section 3(a) of the VCAA, 38 U.S.C. §§ 5103, 5103A, which provides for increased assistance to veterans preparing their claims.

The Court of Appeals for Veterans Claims denied Kuzma's motion for remand, citing *Dyment v. Principi,* 287 F.3d 1377 (Fed. Cir. 2002), and *Bernklau v. Principi,* 291 F.3d 795 (Fed. Cir. 2002), which hold that section 3(a) of the VCAA is not retroactively available to claims pending on the date of the VCAA's enactment, November 9, 2000. The court then reaffirmed the board's decision denying

Kuzma's claim for an increased rating. Kuzma timely appealed and we have jurisdiction pursuant to 38 U.S.C. § 7292(c).

Discussion

"[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). "There is nothing in the VCAA to suggest that section 3(a) was intended to applied [sic] retroactively. In fact, the statutory context strongly suggests the contrary." *Dyment,* 287 F.3d at 1385; *see also Bernklau,* 291 F.3d at 804 (citing both *Landgraf* and *Bowen* to confirm that *Dyment's* holding "was plainly correct").

Kuzma argues that the Court of Appeals for Veterans Claims erred by not applying its own precedent as set out in *Karnas v. Derwinski,* 1 Vet. App. 308 (1991), and *Holliday v. Principi,* 14 Vet. App. 280 (2001). *Karnas* held that "where the law or regulation changes after a claim has been filed or reopened but before the administrative or judicial appeal process has been concluded, the version most favorable to appellant should and we so hold will apply unless Congress provided otherwise or permitted the Secretary . . . to do otherwise and the Secretary did so." 1 Vet. App. at 313. After enactment of the VCAA, but prior to *Dyment* and *Bernklau,* the court relied on *Karnas* to conclude that "all provisions of the VCAA are potentially applicable to claims pending on the date of the VCAA's enactment." *Holliday,* 14 Vet. App. at 286. It reasoned that "there can be no question that Congress, which is

presumed to be aware of [*Karnas*] and its progeny at the time of enacting the VCAA, clearly did not provide the specificity required by *Karnas* to disavow retroactivity." *Id.*

Because neither we nor the Court of Appeals for Veterans Claims have explicitly overruled *Karnas,* Kuzma argues that it is still controlling precedent in the Court of Appeals for Veterans Claims. Therefore, that court was bound to follow it and remand the case to the board for readjudication. The government responds that both *Dyment* and *Bernklau* implicitly overruled *Karnas.* We agree.

We are obligated to apply both Supreme Court precedent, *see Williams v. United States,* 240 F.3d 1019, 1030 (Fed. Cir. 2001), and our own to resolve the issues before us. The Court of Appeals for Veterans Claims, in turn, is bound by our rulings. *See* 38 U.S.C. § 7292(c) (2000). We have twice before held that section 3(a) of the VCAA does not apply retroactively.

Applying *Karnas* to section 3(a) of the VCAA, which makes no mention of retroactivity, would impermissibly require its retroactive application. Further, *Holliday's* holding that all provisions of the VCAA have retroactive effect is incompatible with *Dyment* and *Bernklau.* Although we did not explicitly overrule *Holliday* in those cases, the Court of Appeals for Veterans Claims has recognized that we did so implicitly. *See Charles v. Principi,* 16 Vet. App. 370, 373 (2002) (citing *Holliday* while noting that both *Dyment* and *Bernklau* overruled it in part). Today we remove all doubt and overrule both *Karnas* and *Holliday* to the extent they conflict with the Supreme Court's and our binding authority.

Conclusion

Accordingly, the judgment of the Court of Appeals for Veterans Claims is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT
ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 08/25/03

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and petitions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellant(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued).

/s/ Jan Horbaly/BS
JAN HORBALY
Clerk

cc: KENNETH M. CARPENTER
JOHN S. GROAT

KUZMA V DVA, 03-7032
CVA - 98-295

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

03-7032

THOMAS J. KUZMA,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee.

ORDER

(Filed Oct. 16, 2003)

A petition for rehearing en banc having been filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 23, 2003.

FOR THE COURT,

/s/ Jan Horbaly amt
Jan Horbaly
Clerk

Dated: October 16, 2003

cc: Kenneth M. Carpenter
John S. Groat

KUZMA V DVA, 03-7032
(CVA - 980295)

* *
* Note: Pursuant to Fed. Cir. R. 47.6, this order *
* is not citable as precedent. It is a public record. *
* *

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 98-295

THOMAS J. KUZMA, APPELLANT,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before IVERS, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

IVERS, *Judge*: The veteran, Thomas J. Kuzma, appeals an October 17, 1997, decision of the Board of Veterans' Appeals (BVA or Board) that denied the veteran entitlement to an increased rating for post-traumatic stress disorder (PTSD) and dysthymic disorder. Record (R.) at 3. The veteran submitted a brief, a reply brief, and a motion for remand pursuant to the Veterans Claims Assistance Act of 2000 (VCAA), Pub.L. No. 106-475, 114 Stat.2096 (Nov. 9, 2000). The Secretary also submitted a brief.

The Court will deny the veteran's motion for remand and decide the case on the merits. The basis for the veteran's motion for remand pursuant to the VCAA has recently been addressed by the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Bernklau v. Principi,* 291 F.3d 795 (Fed. Cir. 2002) and *Dyment v. Principi,* 287 F.3d 1377, 1385 (Fed. Cir. 2002). In both decisions, the Federal Circuit held that those sections of the VCAA codified at 38 U.S.C. §§ 5102, 5103, and 5103A,

concerning notice and assistance to be provided to claimants by VA, are not retroactively applicable to proceedings that were complete before VA and were on appeal to this Court or the Federal Circuit when the VCAA was enacted. *See Bernklau, supra.*

The Board decision on appeal in the present case was issued on October 17, 1997, more than three years before the November 2000 enactment of the VCAA. The Court concludes, therefore, that a remand for the Board to consider the matters on appeal in light of the sections of the VCAA codified at 38 U.S.C. §§ 5102, 5103, and 5103A is *not* required. *See Bernklau* and *Dyment,* both *supra.* The remaining sections of the VCAA are not implicated in this appeal. In particular, the appeal does not raise issues regarding well groundedness or the benefit of the doubt doctrine. *See, e.g.,* 38 U.S.C. § 5107; *see generally Dela Cruz v. Principi,* 15 Vet. App. 143, 148-49 (2001) (Court found that VCAA did not change benefit of the doubt doctrine); *Luyster v. Gober,* 14 Vet. App. 186 (2000) (recognizing that VCAA required remand for readjudication if claim had been denied as not well grounded). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. § 7252(a). For the reasons set forth below, the Court will affirm the Board's October 17, 1997, decision.

I. FACTS

The veteran served on active duty in the United States Marine Corps from October 13, 1969, to October 12, 1971, including service in Vietnam. R. at 16. On November 21, 1989, the veteran was voluntarily admitted to the VA medical center located in Wilkes-Barre, Pennsylvania. R.

at 23. On December 20, 1989, the veteran was discharged. *Id.* The veteran was diagnosed with dysthymic disorder, episodic alcohol abuse, and "personality disorder, other." *Id.*

On March 23, 1990, the veteran submitted a statement in support of his claim for PTSD in which he described his in-service stressor. R. at 38. In November 1990, the Social Security Administration (SSA) granted the veteran disability benefits for personality disorder. R. at 283. On February 15, 1991, the veteran underwent a VA psychiatric compensation and pension examination. R. at 81. The veteran was diagnosed with "[PTSD], delayed onset" and "personality disorder, other." R. at 82. The examiner concluded that the veteran suffered from moderate social and industrial impairment. *Id.* The veteran underwent another psychiatric compensation and pension examination on February 27, 1991. R. at 83. Once again, the veteran was diagnosed as suffering from PTSD, dysthymic disorder, and personality disorder. R. at 85.

On April 22, 1991, the regional office (RO) granted the veteran service connection for his PTSD and dysthymic disorder with a disability rating of 30%. R. at 93. In October 1991, the veteran filed a Notice of Disagreement (NOD) claiming that he was entitled to a rating in excess of 30%. R. at 97. In December 1991, the RO issued a statement of the case (SOC). R. at 105.

In April 1992, the RO held a hearing and the veteran testified. R. at 133-41. The veteran argued that he was entitled to a higher disability rating because SSA granted him a 100% disability rating. R. at 135. At no time during the hearing did the veteran contest the effective date of his award.

On August 20, 1992, the hearing officer issued a decision denying the veteran entitlement to a higher disability rating and continuing his 30% evaluation. R. at 211-12. In September 1992, a Supplemental Statement of the Case (SSOC) was issued. R. at 207. On October 7, 1994, the Board remanded the case to the RO for further adjudication of the veteran's claim for entitlement to a higher disability rating. R. at 276-79. The Board directed, inter alia, that:

> 1. The RO should directly contact the SSA and obtain copies of all medical records in possession if that agency, and a copy of the ALJ decision, related to the SSA disability benefits.
>
> 3. The RO should obtain the veteran's vocational rehabilitation training folders, including counseling records, and these should be associated with the claims folder as part of the appellate record.

R. at 278. On December 15, 1994, the RO requested the veteran's SSA medical records and a copy of the administrative law judge's (ALJ) decision. R. at 282. The SSA sent the veteran's medical records and a copy of the decision of the ALJ. R. at 284-406.

On February 26, 1996, the veteran underwent a VA compensation and pension examination. R. at 481. The veteran was diagnosed as suffering from "[PTSD], dysthymic disorder, alcohol abuse, in early full remission, personality disorder, not otherwise specified." R. at 484. On March 30, 1996, the RO issued a rating decision assigning the veteran a disability rating of 50%. R. at 486-87. The veteran filed a NOD on May 30, 1996. R. at 501. The RO issued a SSOC. R. at 532. On October 7, 1997, the Board issued its decision denying the veteran's claim for

an increased rating (R. at 1-16), and this appealed [sic] followed.

II. ANALYSIS

A. Failure to Comply with Board's 1994 Remand Order

The veteran argues that the RO violated *Stegall v. West,* 11 Vet. App. 268 (1998), because it did not fully comply with the Board's 1994 remand order in that it failed to obtain all of the SSA and VA Vocational Rehabilitation records which would have been relevant to his claim. Brief (Br.) at 40-41. Earlier in his brief, the veteran acknowledges that the RO complied with the Board's remand order. Br. at 39-40.

In his brief, the veteran has repeatedly misstated the terms of the Board's remand order. On October 7, 1994, the Board remanded the veteran's claim to the RO for the following action:

> 1. The RO should directly contact the SSA and obtain copies of all medical records in possession of that agency, and a copy of the ALJ decision, related to SSA disability benefits.
>
> 3. The RO should obtain the veteran's VA vocational rehabilitation training folders, including counseling records, and these should be associated with the claims folder as part of the appellate record.

R. at 278.

In *Stegall,* the Court held that "a remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the

remand orders." *Stegall,* 11 Vet. App. at 271. The Board's remand orders were specific. The Board directed the RO to obtain the veteran's SSA medical records, a copy of the ALJ decision related to his SSA disability benefits claim, and the veteran's VA vocational rehabilitation records. R. at 278. Upon review of the record, the Court concludes that the RO fully complied with the Board's remand order. R. at 115-31, 189-205, 214-23, 228-31, 236-72, 281-406, 287. The American Legion, on behalf of the veteran, submitted a written presentation to the Board on September 19, 1997. R. at 550-53. In it, they specifically noted the terms of the remand order and made no argument that it had not been complied with. *Id.* The written presentation did not contain an allegation that the RO failed to comply with the Board's remand order. *Id.* The veteran concedes in his brief that the RO obtained the required records specified in the Board's remand order. Br. at 39-40. Therefore, the Court will hold that the Secretary complied with the remand order in accordance with *Stegall.*

B. Duty to Assist

The veteran argues, that:

> [A]lthough the RO obtained the Social Security records which were specified in the BVA's order, it failed to fully comply with the BVA's order as to additional Social Security records which would also be relevant to Mr. Kuzma's claim. Such failure was a patent breach of the VA's duty to assist . . . and a violation of *Stegall v. West,* 11 Vet. App. 268 (1998).

Br. at 40. The veteran asserts that, because the RO failed to obtain the necessary SSA and VA vocational records, which would have confirmed that he was unemployed for

five years due to symptoms of PTSD, the RO violated the pre-VCAA duty to assist. Br. at 41-42.

The veteran's duty to assist argument is premised on the same SSA records that the Board allegedly failed to secure in violation of *Stegall, supra.* The Court will hold that the Secretary has complied with *Stegall.* Thus, the veteran is asking the Court to treat a non-existent *Stegall* violation and an alleged duty to assist violation as one and the same.

Although the veteran has stated that there are SSA records that would assist him in proving his claim, he has not specified which, if any, SSA records VA failed to obtain. A review of the SSA records shows that the veteran was receiving Social Security disability compensation for a personality disorder. R. at 283. Thus, the veteran was awarded SSDI compensation for a non-service-connected disability (*Id.*), therefore any unemployment stemming from this disability is irrelevant to his PTSD claim for VA service connection and would not serve to establish his entitlement to an increased disability rating for PTSD and dysthymic disorder. *See Pratt v. Derwinski,* 3 Vet. App. 269, 272 (1992) (TDIU may not be awarded based upon non-service connected disabilities). When this Court ordered that the veteran's claim be remanded, it identified specific records in the possession of SSA that were relevant to the veteran's claim for an increased disability rating. R. at 278. VA requested (R. at 282) and received those records from SSA. R. at 281, 283-406.

C. Inadequate Reasons and Bases

The veteran argues "that the fact that the BVA makes reference to a substantial portion of the record, does not

necessarily mean that the BVA has either satisfied its duty under 38 U.S.C. § 7104(a), or provided an adequate statement of its reasons and bases under 38 U.S.C. § 7104(d)(1)." Br. at 42. Specifically, he asserts that the Board did not address evidence regarding his unemployment and "failed to identify with specificity the period of [his] unemployment[.]" Br. at 41-44.

The veteran believes that the Board was required to discuss his unemployment status and its duration because his appeal encompassed a claim for an increased disability rating with an earlier effective date of January 1990. Br. at 43. The veteran has raised the issue of entitlement to an earlier effective date for the first time, before this Court. Prior to this appeal, the veteran has not contested the RO's or the Board's determination of the effective date of his award for service connection for PTSD. See R. at 97, 113, 133-41, 139, 234.

The Court, pursuant to *Maggitt v. West,* 202 F.3d 1370, 1377 (Fed. Cir. 2000), may, at its own discretion, hear legal arguments presented for the first time on appeal provided that it has jurisdiction of the claim. The Court will not address the veteran's argument that, encompassed in his claim for an increased evaluation, is his entitlement to an earlier effective date.

Finally, the veteran has advanced other arguments in his brief and reply brief which the Court concludes are without merit and, as such, the Court will not address those arguments.

III. CONCLUSION

After consideration of the parties submissions and a review of the record on appeal, the Court holds that the veteran has not demonstrated that the Board committed either legal or factual error which would warrant reversal or remand. Therefore, the Board's October 17, 1997, decision is AFFIRMED.

DATED: JUL 30 2002

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Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 98-295

THOMAS KUZMA, APPELLANT,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered this date.

DATED: SEP 13 2002

FOR THE COURT:
NORMAN Y. HERRING
Clerk of the Court
By: /s/ Karen Meyers
Deputy Clerk

Copies to:

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App. 20

03-7032

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THOMAS J. KUZMA,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veteran Affairs,

Respondent-Appellee.

APPEAL FROM UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS IN 98-0295
JUDGE DONALD L. IVERS

APPELLANT'S PETITION FOR REHEARING *EN BANC* AND ADDENDUM

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September 18, 2003

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 28(a)(1) and 47.4, counsel for-Claimant-Appellant Thomas J. Kuzma certifies the following:

1. The full name of every party or amicus represented by me is:

   Thomas J. Kuzma.

2. The name of the real party in interest represented by me is:

   None.

3. The parent companies, subsidiaries and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are:

   None.

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court of agency or are expected to appear in this Court are:

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TABLE OF CONTENTS

PAGE

CERTIFICATE OF INTEREST i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES ..... iii-iv
STATEMENT OF COUNSEL v

APPELLANT'S PETITION FOR REHEARING *EN BANC* AND ADDENDUM 1

POINTS OF LAW TO BE CONSIDERED 2

I. The Veterans Court Correctly Decided ***Karnas*** 2

A. The Case Below 2

II. Why the Rule of Retroactivity was not for Application In ***Dyment*** and ***Bernklau*** 5

A. The Holding in ***Landgraf*** 5

B. Why the Supreme Court Cases in ***Thorpe/Bradley*** were for Application in ***Dyment*** and ***Bernklau*** 7

CONCLUSION 11

CERTIFICATE OF SERVICE 13

ADDENDUM TABLE OF CONTENTS vi

TABLE OF AUTHORITIES

PAGE

CASE AUTHORITY

Bernklau v. Principi,
291 F.3d 795 (Fed.Cir. 2002) ..... v, 1-3, 7, 10, 11

Bowen v. Georgetown Univ. Hospital,
488 U.S. 204 (1988) 1, 2, 6

Bradley v. School Bd. of Richmond,
416 U.S. 696 (1974) ..... v, 2-4, 6-11

Dyment v. Principi,
287 F.3d 1377 (Fed.Cir. 2002) ..... v, 1-3, 7, 10, 11

Goodyear Atomic Corp. v. Miller,
486 U.S. 174, 184-85, 108 S.Ct. 1704,
100 L.Ed.2d. 158 (1998) 4

Karnas v. Derwinski,
1 Vet.App. 308 (1991) ..... v, 1, 3, 4, 9-11

Holliday v. Principi,
14 Vet.App. 280 (2001) ..... v, 1, 3, 4, 8

Landgraf v. USI Film Products et al.,
511 U.S. 284 (1994) ..... v, 1, 2, 5-11

Lorillard v. Pons,
434 U.S. 575, 580-81, 98 S.Ct. 866,
55 L.Ed2d. 40 (1978) 4

Thorpe v. Housing Authority of City of Durham,
393 U.S. 298 (1969) ..... v, 2-4, 7-11

STATUTES

PAGE

38 U.S.C. § 5102 11

38 U.S.C. § 5103 11

38 U.S.C. § 5103A 11

38 U.S.C. § 5106 11

OTHER

Veterans Claims Assistance Act of 2000
(VCAA) 2, 3, 5, 6, 9, 11

STATEMENT OF COUNSEL

Based on my professional judgment, I believe this matter requires rehearing *en banc* because the panel decisions in ***Dyment v. Principi***, 287 F.3d. 1377 (Fed.Cir. 2002) and ***Bernklau v. Principi***, 291 F.3d. 795 (Fed.Cir. 2002), did not follow the correct rule of law regarding an

appellate court's obligation to apply the law in effect at the time that the Court renders its decision pursuant to the Supreme Court's decisions in ***Bradley v. School Bd. of Richmond***, 416 U.S. 696 (1974) and ***Thorpe v. Housing Authority of City of Durham***, 393 U.S. 298 (1969). Instead, the decisions in ***Dyment*** and ***Bernklau*** applied the rule of retroactivity set out in ***Landgraf v. USI Film Products et al.***, 511 U.S. 284 (1994). The rule of retroactivity was not for application in either ***Dyment*** or ***Bernklau***.

Furthermore, the panel decisions in ***Dyment*** and ***Bernklau*** did not consider the decision of the United States Court of Appeals for Veterans Claims in ***Karnas v. Derwinski***, 1 Vet.App. 308 (1991) and ***Holliday v. Principi***, 14 Vet.App. 280 (2001). The Veterans Court, prior to the Supreme Court's decision in ***Landgraf***, correctly applied the rule of law set out in the Supreme Court's cases of ***Bradley*** and ***Thorpe***.

_____

Kenneth M. Carpenter
Attorney for Appellant

03-7032

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

THOMAS J. KUZMA,
Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

APPELLANT'S PETITION FOR REHEARING *EN BANC* AND ADDENDUM

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and this Court's Rules, Thomas J. Kuzma, respectfully moves for a rehearing *en banc* of the August 25, 2003 decision of the Court overruling the decisions of the Veterans Court in ***Karnas v. Derwinski***, 1 Vet.App. 308 (1991) and ***Holliday v. Principi***, 14 Vet.App. 280 (2001), because the panel was obligated to apply the panel decisions in ***Dyment v. Principi***, 287 F.3d. 1377 (Fed.Cir. 2002) and ***Bernklau v. Principi***, 291 F.3d. 795 (Fed.Cir. 2002), which had incorrectly applied the rule of retroactivity set out in ***Landgraf v. USI Film Products et al.***, 511 U.S. 284 (1994) and ***Bowen v. Georgetown Univ. Hospital***, 488 U.S. 204 (1988).

POINTS OF LAW TO BE CONSIDERED

Appellant respectfully submits that the panel decisions in ***Dyment v. Principi***, 287 F.3d. 1377 (Fed.Cir. 2002) and ***Bernklau v. Principi***, 291 F.3d. 795 (Fed.Cir. 2002) were wrongly decided by the respective panels based upon the application of the rule of retroactivity set out in

Landgraf v. USI Film Products et al., 511 U.S. 284 (1994) and ***Bowen v. Georgetown Univ. Hospital***, 488 U.S. 204 (1988). Both panels mistakenly applied the controlling rule of law of retroactivity rather than apply the rule that an appellate court must apply the law in effect at the time it renders its decision as provided for in the Supreme Court's decisions of ***Bradley v. School Bd. of Richmond***, 416 U.S. 696 (1974) and ***Thorpe v. Housing Authority of City of Durham***, 393 U.S. 298 (1969).

I. The Veterans Court Correctly Decided *Karnas*.

A. The Case Below.

Mr. Kuzma's appeal had been decided adversely by the Veterans Court but prior to the issuance of the mandate Congress enacted the Veterans Claims Assistance Act of 2000 (VCAA). However, the Veterans Court recalled its judgment affirming the Board's decision on November 7, 2000 and ultimately issued an order of supplemental briefing regarding the impact of the enactment of the VCAA. Mr. Kuzma filed a motion for remand, relying upon the Veterans Court's precedent in ***Karnas v. Derwinski***, 1 Vet.App. 308 (1991) and ***Holliday v. Principi***, 14 Vet.App. 280 (2001).

The Veterans Court denied Mr. Kuzma's motion for remand relying upon this Court's decisions in ***Dyment*** and ***Bernklau*** which held that section 3(a) of the VCAA was not retroactively available to claims pending on date of enactment of the VCAA, November 9, 2000. The Veterans Court reaffirmed the Board's decision denying Mr. Kuzma's claim for an increased rating and an appeal to this Court was taken.

B. *Karnas* and *Holliday*.

In ***Karnas,*** the Veterans Court established the following rule to be applied by that Court with regard to a change in law during the pendency of an appeal:

> where the law or regulation changes after a claim has been filed or reopened but before the administrative or judicial appeal process has been concluded, the version most favorable to appellant should and we so hold will apply *unless Congress provided otherwise* or permitted the Secretary of Veterans Affairs (Secretary) to do otherwise and the Secretary did so. (emphasis added).

Karnas, 1 Vet.App. at 313.

The Veterans Court, in establishing this rule, relied upon the Supreme Court's decisions in ***Bradley*** and ***Thorpe***. ***Karnas***, 1 Vet.App. at 312.

The Veterans Court concluded that for purposes of considering appeals to that Court, the Supreme Court's decisions in ***Bradley*** and ***Thorpe*** were controlling. The Veterans Court held that:

> This formulation would never result in "manifest injustice" to the United States Government because Congress controls or may permit the Secretary to control which law is to be applied. The rule which we adopt would also comport with the general thrust of the duty-to-assist and the benefit-of-the-doubt doctrines embedded in title 38 of the United States Code and Code of Federal Regulations which spring from a general desire

> to protect and do justice to the veteran who has, often at great personal cost, served our country.

Karnas, 1 Vet.App. at 313.

In ***Holliday***, the Veterans Court, in applying ***Karnas*** found that:

> there can be no question that Congress, which is presumed to be aware of that opinion [referring to ***Karnas***] and its progeny at the time of enacting the VCAA, clearly did not provide the specificity required by ***Karnas*** to disavow retroactivity. *See generally,* ***Goodyear Atomic Corp. v. Miller***, 486 U.S. 174, 184-85, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1998) ("[w]e generally presume that Congress is knowledgeable about existing law pertinent to legislation it enacts"); ***Lorillard v. Pons***, 434 U.S. 575, 580-81, 98 S.Ct. 866, 55 L.Ed.2d. 40 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where . . . Congress adopts a new law incorporating sections of a prior law Congress can normally be presumed to have had knowledge of the interpretation given to the incorporated law. . . ." (citations omitted)).

Holliday, 14 Vet.App. at 286.

The Veterans Court, relying upon ***Karnas*** and the rule of law provided for by the Supreme Court in ***Bradley*** and ***Thorpe*** that the Veterans Court would apply the law as it existed at the time of their decision, held that all provisions of the VCAA are potentially applicable to claims pending on the date of the VCAA's enactment.

II. Why the Rule of Retroactivity was not for Application *Dyment* and *Bernklau*.

A. The Holding in *Landgraf*.

Landgraf involved a suit under Title VII of the Civil Rights Act of 1964 – she had been sexually harassed by a co-worker at respondent USI Film Products. ***Landgraf***, 511 U.S. at 244. During the pendency of the appeal, Congress enacted an amendment to the Civil Rights Act in 1991. The Supreme Court indicated that:

> . . . this Court must focus on the apparent tension between two seemingly contradictory canons for interpreting statues [sic] that do not specify their temporal reach: the rule that a court must apply the law in effect at the time it renders its decision . . . and the axiom that statutory retroactivity is not favored, . . .

Landgraf, 511 U.S. at 245.

The Supreme Court expressly noted that, "It is not uncommon to find 'apparent tension' between different canons of statutory construction." ***Landgraf***, 511 U.S. at 263.

Landgraf recognized the following:

> The first is the rule that "a court is to apply the law in effect at the time it renders its decision," . . . .

Landgraf, 511 U.S. at 264.

> The second is that axiom that "[r]etroactivity is not favored in the law," and its interpretive corollary that "congressional enactments and administrative rules will not be construed to

> have retroactive effect unless their language requires this result."

Landgraf, 511 U.S. at 264.

> We begin by noting that there is no tension between the holdings in ***Bradley*** and ***Bowen***[1], both of which were unanimous decisions.

Landgraf, 511 U.S. at 264.

The Supreme Court specifically indicated that the opinion in ***Bowen*** did not purport to overrule ***Bradley*** or to limit its reach. ***Landgraf***, 511 U.S. at 265. The opinion in ***Landgraf*** acknowledges:

> Although we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should "apply the law in effect at the time it renders its decision," ***Bradley***, 416 U.S., at 711, 94 S.Ct., at 2016, even though that law was enacted after the events that gave rise to the suit.

Landgraf, 511 U.S. at 273.

Landgraf held that:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed

---

[1] ***Bowen v. Georgetown Univ. Hospital***, 488 U.S. 204 (1988)

> when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280.

The analysis made by the Supreme Court in ***Landgraf*** was that:

> In cases like this one, in which prior law afforded no relief, § 102 can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced. Section 102 confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged, and the novel prospect of damages liability for their employers.

Landgraf, 511 U.S. at 283.

The Court expressly distinguished its holding in ***Landgraf*** from its holding in ***Bradley*** in the following passage:

> Even under that view, however, the provision would, if applied in cases arising before the Act's effective date, undoubtedly impose on employers found liable a "new disability" in respect to past events. The extent of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored. Neither in ***Bradley*** itself, nor in any case before or since in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party

> to apply to conduct occurring before the statute's enactment.

Landgraf, 511 U.S. at 283-284.

B. Why the Supreme Court Cases in *Thorpe/ Bradley* were for Application in *Dyment* and *Bernklau*.

Although the Supreme Court applied the rule of law that retroactivity is not favored in the law, it explicitly reaffirmed the continuing viability of the holdings in ***Bradley***, 416 U.S. at 696 and ***Thorpe***, 393 U.S. at 268. ***Landgraf***, 511 U.S. 277-280. The ***Landgraf*** holding applied the rule of retroactivity to "recognized situations," while acknowledging that there are other circumstances where the Court should apply the law in effect at the time it renders its decision. The statutory provisions of the VCAA are not in the category of the "recognized situations," in which the Supreme Court requires the imposition of the presumption against statutory retroactivity.

The provisions of the VCAA, as recognized by the Veterans Court in ***Holliday***, do not burden private rights, do not impose an additional burden on the government, and do not increase a party's liability for past conduct. The Supreme Court in ***Landgraf*** clearly articulated that notwithstanding the long embraced presumption against statutory retroactivity, "in many situations a Court should apply the law in effect at the time it renders its decisions." ***Landgraf***, 511 U.S. at 273. ***Landgraf*** clearly states that "even absent specific legislative authorization, application of new statutes past [sic] after the events in suit is unquestionably proper in many situations." ***Landgraf***, 511 U.S. at 273.

Despite the fact that the rule of retroactivity was applied by the Supreme Court in ***Landgraf***, the Supreme Court took great care to distinguish the parallel line of cases in ***Thorpe*** and ***Bradley*** from the cases in which the presumption against statutory retroactivity was to be invoked. ***Landgraf***, 511 U.S. at 276-279. "***Bradley*** relied on ***Thorpe*** and on other precedents that are consistent with the presumption against statutory retroactivity, including decisions involving explicitly retroactive statutes." ***Id*** at 278. Consistent with the Supreme Court's analysis in ***Landgraf***, the Veterans Court in ***Karnas*** correctly relied upon the Supreme Court precedent established in ***Bradley*** and ***Thorpe*** to conclude that the rule of law to be applied in that Court was the "law as it existed at the time" of the appellate decision. ***Landgraf*** declares "we now make it clear that ***Bradley*** did not alter the well-settled presumption against application of the class of new statutes that would have genuinely 'retroactive' effect." ***Id*** at 277.

Although the Supreme Court granted retroactive application in both ***Thorpe*** and ***Bradley***, the Court in ***Landgraf*** emphasized that those holdings were compatible with their line of decisions disfavoring "retroactive" application of statutes. *See* ***Landgraf***, 511 U.S. at 276-277. Simply stated, the Supreme Court in ***Landgraf*** indicated that both ***Thorpe*** and ***Bradley*** were "recognized situations" where retroactive effect was unquestionably proper and the Court should apply the law in effect at the time it renders its decision.[2] Equally, the retroactive

[2] It should be noted that ***Thorpe*** and ***Bradley***, as is the circumstance here, involved statutory amendments that worked a benefit to a

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application of 38 U.S.C. §§ 5102, 5103, 5103A and 5106 would provide comparable assistance benefits to all veterans without a manifest injustice to the government as noted by the Veterans Court in ***Karnas*** in applying the Supreme Court's decisions in ***Thorpe*** and ***Bradley*** to appeals pending before the Veterans Court.

Mr. Kuzma submits that the Supreme Court's decision in ***Landgraf*** acknowledged that the retroactive application of the statute at issue in ***Landgraf*** was not the type of provision which fell into the ***Thorpe/Bradley*** line of decisions. Conversely, the provisions of the VCAA do fall within the ***Thorpe/Bradley*** line of decisions from the Supreme Court. There was nothing in the holding in ***Landgraf*** that should have caused this Court in ***Dyment*** and ***Bernklau*** to conclude that the provisions of the VCAA should not have been applied by this Court as the law as it existed at the time of those decision consistent with the Supreme Court's decisions in ***Thorpe*** and ***Bradley***.

The holdings in ***Thorpe*** and ***Bradley*** were for application in the disposition of ***Dyment*** and ***Bernklau***. The

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class of private persons. In ***Thorpe***, the administrative rule given retroactive effect provided that federal housing authority had to give a tenant notice of reasons and opportunity to respond before being evicted. The ***Landgraf*** Court stated that the ***Thorpe*** holding was consistent with the principle that the government should accord race to private parties disadvantaged by an old rule when it adopts a new and more generous one. ***Landgraf***, 511 U.S. at 276 n.30. Similarly, in ***Bradley***, the Supreme Court gave retroactive effect to an attorney fee provision contained in an amended statute. The Supreme Court noted that an award of attorney fees under the Civil Rights Act of 1964 served to benefit private plaintiffs as it put them in a position to advance to public interest by invoking the injunctive powers of the federal courts. ***Bradley***, 416 U.S. at 719.

rule of law created in those cases required that the law as it existed at the time of the appellate decision should have been applied, as had been previously recognized by the Veterans Court in ***Karnas***. The application of the ***Thorpe/Bradley*** line of cases is further buttressed by the uniquely pro-claimant nature of the statutory scheme which was amended by Congress.

CONCLUSION

Dyment and ***Bernklau*** were wrongly decided. The rule of retroactivity in ***Landgraf*** was not for application. The rule articulated in ***Thorpe/Bradley*** was for application.

Mr. Kuzma's case was wrongly decided based upon the error made by the panel in ***Dyment*** and ***Bernklau***. The Veterans Court correctly decided ***Karnas*** by properly applying the Supreme Court's decisions in ***Thorpe*** and ***Bradley***. ***Karnas*** should not have been overruled in this case or by the decisions in ***Dyment*** and ***Bernklau***.

Mr. Kuzma, for the foregoing reasons, urges the Court to reconsider this matter *en banc* in light of the Supreme Court's decisions in ***Thorpe*** and ***Bradley***.

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[**ADDENDUM** Omitted In Printing]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and fifteen copies of the above and foregoing document has been shipped by overnight delivery to the Clerk and two copies to the below named counsel for Appellee on the 18th day of September, 2003, addressed to:

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